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SUBMITTED ELECTRONICALLY VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Communication
MB Docket No. 15-216 – *Implementation of Section 103 of the STELA Reauthorization Act of 2014: Totality of the Circumstances Test*
MB Docket No. 10-71 – *Amendment of the Commission's Rules Related to Retransmission Consent*

Dear Ms. Dortch:

Mediacom Communications Corporation ("Mediacom") submits this letter in response to arguments presented by the National Association of Broadcasters ("NAB") in a meeting with Commission staff on June 16, 2016.[1/] According to the ex parte notice filed regarding that meeting, NAB focused on two issues: (i) the Commission's authority to order interim carriage of a broadcast station as a means of remedying violations of the good faith negotiation requirement and (ii) the Commission's authority to prohibit a broadcast station from blocking the customers of a cable operator's Internet service from accessing online content as a retransmission consent negotiating tactic. As it has in the past, NAB's arguments are based on a misreading of the relevant law and a mischaracterization of the specific changes to the good faith rules that Mediacom and others have proposed in the above-referenced dockets.

Remedial Interim Carriage Authority. Mediacom and others have urged the Commission not only to revise its rules to define certain additional forms of behavior (such as a refusal to extend an expiring agreement in the absence of a true impasse between the parties or to seek resolution of an impasse through a temporary period of non-binding mediation) as evidence of bad faith, but also to make clear that, in appropriate circumstances, the Commission can and will order a negotiating party to agree to a period of interim carriage as a remedy for violations of the good faith rules (and as a form of interlocutory relief while complaints alleging such violations

[1/] *See* Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216 and 10-71 (filed June 20, 2016) ("NAB Letter").

are pending). As it has in the past, NAB attempts to counter these proposals by arguing that they conflict with the "unqualified right to control their signals" conferred on broadcasters by Section 325. However, acceptance of NAB's position would require the Commission to read into the Communications Act a non-existent limitation on the Commission's regulatory authority with respect to retransmission consent negotiations and to read out of the Act the authority granted therein to the Commission to regulate the exercise of retransmission consent and to implement and enforce the good faith rules.[2/]

Simply put, no matter how many times NAB repeats the assertion that Congress intended to preclude the Commission from ordering a station to grant retransmission consent for an interim period as a remedial or prophylactic measure , it cannot escape the fact that a broadcaster's control of its signals is not "unqualified" under Section 325 and that the requirement that retransmission consent must be "expressly" granted by a broadcaster does not in any way bar the Commission from protecting the public interest by ordering a station to make such an express grant for an interim period as a remedial or prophylactic measure.[3/]

Online Blocking as a Bad Faith Negotiating Tactic. One of the retransmission consent reform proposals made by Mediacom (and endorsed by a number of other parties) asks the Commission to rule that a broadcaster violates its duty to negotiate retransmission consent in good faith when, as a strong-arm tactic during a retransmission consent negotiation or during a retransmission consent blackout, the broadcaster blocks a cable ISP's customers from accessing web content that the broadcaster otherwise makes available for free to any Internet user. Even though this practice was cited in the legislative history of Section 103 of the STELA Reauthorization Act as a matter of particular concern to Congress[4/], NAB contends that the adoption of good faith standard addressing the use of online blocking as a strong-arm negotiating tactic would effectively create a "compulsory license" forcing broadcasters "to continue providing [online content] to benefit an MVPD's subscription broadband service" in violation of Section 106 of the Copyright Act.[5/] NAB further contends that the Commission's "limited" authority to ensure retransmission consent negotiations are conducted in good faith does not allow it to "regulate online content simply because that content is distributed via the Internet by an entity that also happens to be a broadcaster who at times engages in retransmission consent negotiations."[6/] NAB's arguments distort copyright law, Section 325, and the proposed good faith standard.

First, although NAB is correct that Section 106 of the Copyright Act reserves to copyright owners "the exclusive right to authorize, or to refuse to authorize, others from publicly

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[2/] It also reads out of the Act the Commission's well-established plenary authority —plenary authority to regulate broadcasters to ensure that they operate in a manner consistent with the public interest. *See generally* Reply Comments of Professor James Speta, MB Docket No. 15-216 (filed Jan.14, 2016).

[3/] *See* Letter from Seth A. Davidson, Counsel to Mediacom Communications Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216 and 10-71, at 2 (filed June 20, 2016).

[4/] *See* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014).

[5/] NAB Letter at 1-2.

[6/] *Id.*

performing its works," the issue presented by the proposed online blocking rule has nothing to do with the public performance of a broadcaster's content by an ISP or its subscribers (and thus has nothing to do with the concept of a compulsory license requiring a copyright owner to authorize others to publicly perform their works). The law does not treat ISPs as having themselves engaged in public performances whenever their Internet subscribers obtain access to non-infringing performances made available on a website. Indeed, if ISPs were liable for direct infringement merely for providing the conduit over which consumers obtain access to non-infringing content, they would need to obtain licenses from every one of the more than one billion websites that that can be accessed by ISP users today and the Internet would collapse.[7/]

Second, the purpose of restricting broadcasters from blocking online content as a retransmission consent negotiating tactic is not, as NAB claims, to benefit "an MVPD's subscription broadband service."[8/] It is to protect consumers, including consumers who may receive video service and Internet service from different providers (or who may be cord cutters who do not subscribe to any video service) from being held hostage by a broadcaster seeking to increase its leverage in a retransmission consent negotiation.

Third, Mediacom and others are not proposing that the Commission "regulate online content simply because that content is distributed via the Internet by an entity that also happens to be a broadcaster who at times engages in retransmission consent negotiations."[9/] The proposed regulation would only regulate broadcasters when they are blocking a cable ISP's subscribers from obtaining access to content that the broadcaster otherwise makes available to Internet users for free (and without any "license") as a strong-arm bargaining tactic in retransmission consent negotiations.[10/]

Should you have any questions, please contact the undersigned directly.

Sincerely,

Seth A. Davidson
Counsel to Mediacom Communications Corporation

cc: Jonathan Sallet
David Gossett
Susan Aaron
Royce Sherlock

[7/] Indeed, Congress recognized that ISPs, serving as mere conduits, should not be liable for "transitory digital network communications" and provided them a safe harbor from liability under Section 512 of the Digital Millennium Copyright Act. *See* 17 U.S.C. § 512(a).

[8/] NAB letter at 1-2.

[9/] *Id.* at 2.

[10/] As discussed above, NAB's assertion that regulating retransmission consent negotiations in this regard would exceed the Commission's "narrow" authority is based on a misinterpretation of Section 325 that reads out of the statute the express authority given the Commission to implement and enforce the good faith negotiation requirement.